

Shen (Migration) [2019] AATA 3005 (26 March 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Yizu Shen
CASE NUMBER:	1832417
DIBP REFERENCE(S):	BCC2016/2037895
MEMBER:	Justine Clarke
DATE:	26 March 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 26 March 2019 at 5:44pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – continuing spousal relationship – sponsorship withdrawn – sponsor filed for divorce – relationship ceased – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65
Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 18 October 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant, Mr Yizu Shen, is a 66 year old national of China.
4. On 9 June 2016, the applicant applied for the visa on the basis of his relationship with his sponsor, Ms Mei Yun Qi (hereafter the sponsor).
5. At the time of application, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. The primary criteria include cl.820.221(2)(c) which requires that, at the time of decision, the applicant is the spouse or de facto partner of the sponsoring partner.
6. The applicant provided the Tribunal with a copy of the primary decision. The primary decision states that:
 - On 17 August 2018, the sponsor notified the Department that her relationship with the applicant had ceased and that she wished to withdraw her sponsorship.
 - On 22 August 2018, the Department emailed the applicant, by way of his then representative, inviting him to submit additional information.
 - On 14 September 2018, the applicant provided an English translation of his letter of 12 August 2018 detailing the breakdown of the relationship and requesting a permanent visa.
 - On 11 October 2018, the delegate contacted and spoke to the applicant by telephone, making use of a telephone Mandarin interpreter and requesting the applicant's comment on the change to his relationship status and also giving him the opportunity to withdraw the application. On the same day, the Department emailed the applicant confirming the content of the conversation.
 - On 15 October 2018, the applicant emailed the Department and stated that he would not be withdrawing his application and requested that the Department make a decision based on the information before it.
7. The delegate refused to grant the visa on the basis that the applicant did not meet cl.802.221(1) of Schedule 2 to the Regulations because there was no evidence that he met cl.801.221(2), (2A), (3), (4), (5), (6) or (8).
8. On 5 November 2018, the applicant applied to the Tribunal for review of the primary decision. The applicant was unrepresented in this review.
9. On 5 December 2018, the Tribunal wrote a letter to the applicant pursuant to s.359(2) and purportedly pursuant to s.359A of the Act. With respect to s.359A, the Tribunal invited the applicant to comment on or respond to information that it considered would be the reason, or a part of the reason, for affirming the decision under review. The letter stated that information on the Department's file indicates that the applicant's relationship with the sponsoring

partner has ended and that the sponsoring partner has withdrawn the sponsorship. With respect to s.359(2), the Tribunal informed the applicant that if he was no longer in a relationship with the sponsoring partner then there were a number of exceptions under which he could be granted the Partner visa. The letter listed exceptions relating to the death of the sponsoring partner, family violence and certain court orders or responsibilities in relation to children. The letter invited him to provide information that he believes may be relevant to the exceptions. The letter stated that, if the comments or response and the information were not provided in writing by 19 December 2018 or an extension of time not sought by that time, the Tribunal may make a decision on the review without taking further steps to obtain the comments or response or the information.

10. On 19 December 2018, within the requested timeframe, the applicant responded by providing a copy of his statement on 12 August 2018 and the accompanying English translation.
11. On 26 March 2019, the applicant appeared before the Tribunal by video from Sydney to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
12. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue before the Tribunal is whether, at the time of this decision, the applicant is a spouse or de facto partner of the sponsor or, in the event that the relationship has ceased, that certain circumstances exist, as provided for in cl.801.221(5), (6)(i) or (6)(ii).

Whether the parties are in a spouse or de facto relationship

14. Clause 801.221(2)(c) requires that, at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)–(d).
16. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the requirements for a spouse relationship met?

17. As stated earlier, the applicant provided the Tribunal with a copy of the primary decision which indicates that the applicant sought the visa on the basis of his claimed spouse relationship with the sponsor but that in August 2018 the sponsor advised the Department that the relationship had ended.

18. The primary decision outlines that the Department put the applicant on notice that the ongoing nature of the relationship was at issue. Further, the primary decision itself places the applicant on notice that the ongoing nature of the relationship was at issue.
19. Since the primary decision was made on 18 October 2018, the applicant has presented no documentary evidence to show that he continues to be in a relationship with the sponsor. To the contrary, he submitted his written statement of 12 August 2018 which states, amongst other things, that the sponsor had filed for divorce on 18 May 2018. At the hearing, when asked whether his relationship with the sponsor had ceased, the applicant replied in the affirmative.
20. At the time of this decision, there is no evidence before the Tribunal that the applicant and the sponsor:
 - share their finances, have joint liabilities or jointly contribute to expenses;
 - maintain a joint household or share housework—indeed, that they continue to live together or do not live separately and apart on a permanent basis;
 - continue to represent themselves to others as being in a relationship or that they socialise together; and
 - draw companionship and support from each other or continue to have a mutual commitment to the relationship.

21. **CONCLUSION**

22. The Tribunal makes the following findings.
23. From the evidence before the Tribunal, the Tribunal is not satisfied that, at the time of this decision, the applicant and the sponsor:
 - have a mutual commitment to a shared life as husband and wife to the exclusion of all others, as required by s.5F(2)(b) of the Act;
 - have a genuine and continuing relationship, as required by s.5F(2)(c) of the Act; and
 - live together, or do not live separately and apart on a permanent basis, as required by s.5F(2)(d) of the Act.
24. Given these findings, the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the applicant does not meet cl.801.221(2)(c).
25. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221(2A), (3), (4), (5) or (6). To the contrary, at the Tribunal hearing, when informed about the exceptions in cl.801.221(5) and (6)(i) and (6)(ii), the applicant gave oral evidence that the sponsor was alive, that there were no court orders or responsibilities in relation to children and that he was not claiming that he had suffered family violence committed by the sponsor.
26. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

27. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Justine Clarke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).